GLAMOUR IDEALS SDN BHD A

v.

HO HAU WONG & ORS

HIGH COURT MALAYA, IPOH B
LEE SWEE SENG JC
[ORIGINATING SUMMONS NO: 24NCVC-1756-12-2011]
28 JUNE 2013

LAND LAW: *Caveat - Removal of - Caveats lodged by another caveator after court order granted - Application to vary order to include direction for removal of new caveats lodged - Whether court order had been perfected - Whether caveats were lodged to cancel effect of court order - Whether there was abuse of process - Whether caveator had caveatable interest - Whether court order varied* C D

CIVIL PROCEDURE: *Judgment and orders - Order made by court - Variation of - Application to vary order to include direction for removal of new caveats lodged - Whether court functus officio - Whether court had power to vary order - Whether there was abuse of process* E

The first defendant had lodged private caveats on the plaintiff's lands. By way of an order of the court dated 28 November 2012 ('the court order'), the court ordered the first defendant to remove the various private caveats that he had lodged on the plaintiff's lands and ordered the second defendant to cancel the F caveats with immediate effect. On 22 November 2012, one Alexander Li Siu Leong ('the caveator'), a director of Jerard Co Ltd had lodged caveats on the plaintiff's lands. However, the plaintiff only discovered this fact sometime in December 2012, *ie*, after the court order was made. Upon making the discovery, the G plaintiff filed the present application for a variation of the court order. By way of this application, the plaintiff sought to vary the court order by including a further direction from the court for the removal of the caveats lodged by the caveator. The plaintiff submitted that since the court order had not been sealed, the H court was not *functus officio* and thus, could amend or vary the court order it had already made. The plaintiff further submitted that the caveats lodged by the caveator were intended to cancel the effect of the court order. The caveator and Jerard Co Ltd intervened in this application. The first defendant and the I

A interveners submitted that the proper procedure would be for the plaintiff to file a fresh action to remove the caveats lodged by the intervener and that the court could not make a substantial change to the court order earlier granted by adding a further direction for the removal of the fresh caveats lodged by the first intervener. B There were two similar applications for a variation of a court order by different plaintiffs in respect of caveats lodged by the same defendants. It was agreed by all parties that the present application for a variation of the court order would bind the other two applications.

C

Held (allowing plaintiff's application with costs of RM20,000 to be paid by the interveners to the plaintiff):

(1) If a matter could not be brought to the attention of the court because it was unbeknown to the plaintiff at the time when D the court order was made and if that matter would have had an effect on the court order granted, then the matter could be brought up before the court order was perfected. The power of the court to amend or vary an order before it was perfected was part and parcel of the inherent jurisdiction of E the court. Having established that the court was not *functus officio*, it had the power to amend or vary the court order. (paras 13, 14 & 16)

(2) The caveator's caveats were lodged some six days before the F court order was made such that the court order, if granted for the removal of the caveats, would be frustrated by the caveator's caveats. Further, both the caveator and the first defendant were directors of Jerard Co Ltd, the first defendant's nominee company. The caveator's caveats were G lodged for a collateral purpose calculated to contain, if not, to cancel the effect of the court order. Such a collateral action calculated to conceal and obscure the obvious was an obstruction of justice and constituted an abuse of process. (paras 18 & 21)

H

(3) It would be retrogressive to suggest that the matter could only be heard if the plaintiff filed a fresh application for the removal of the caveats since there was a clear abuse of the process. (para 26)

I

(4) The agreement between the first defendant and the interveners to inject monies into the special purpose vehicle in the plaintiff, could not transform the interveners' interest into a caveatable interest. To allow a shareholder or director of a company to lodge a caveat on the land owned by the company just because there were disputes between the shareholders or directors would offend both the principle of separate legal entity and the system and scheme of a caveatable interest under the National Land Code. (paras 28 & 37)

(5) The position of the caveator's caveats on the plaintiff's lands was no different from the first defendant's caveats that had been removed. It was clear that if the caveator's caveats had been brought to the attention of the court then, it would have also ordered the same to be removed. As such, the court order should be varied accordingly to include the removal of the caveator's caveats. This decision would bind the two other similar applications. (paras 39 & 40)

Case(s) referred to:

Affin Bank Bhd v. Tan Sri Kishu Tirathrai (No. 2) [2004] 7 CLJ 145 HC ***(refd)***

Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Chee Kuan Cheng v. Chuo Kong Kah [1967] 1 LNS 21 FC ***(refd)***

Chua Wah Keow v. Ng Ho Huat & Anor [1961] 1 LNS 20 HC ***(refd)***

Commercial Plastic Industries Sdn Bhd v. Lim Chin Cheap & Ors [2002] 4 CLJ 694 HC ***(refd)***

Credit Corporation (M) Bhd v. National Insurance Co Ltd [1975] 1 LNS 21 HC ***(refd)***

Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***

HSBC Bank Malaysia Bhd v. Tirathrai Sdn Bhd [2009] 1 CLJ 286 HC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 3 CLJ 520 CA ***(refd)***

North Plaza Sdn Bhd v. United Securities Sdn Bhd [2010] 1 CLJ 470 CA ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor & Another Appeal [2003] 3 CLJ 339 CA ***(refd)***

Re Roberts [1887] WN 231 ***(refd)***

Score Options Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 FC ***(refd)***

A *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd [1984] 1 LNS 6 FC* ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***

For the plaintiff - CK Yeoh (KL Mah & Adeline Yew with him); M/s Ranjit Singh & Yeoh
B *For the 1st defendant - Anoop Singh; M/s Anoop & See*
For the 2nd defendant - Hamzah Ismail; Assistant State Legal Advisor Perak
For the 3rd defendant - Abd Rahim Mohamed; M/s Tung, Chan & Partners
For the 4th & 5th defendants - SP Raman (M Humavathi with him); M/s S Raman & Co

C *Reported by Vani Krishnan*

JUDGMENT

D **Lee Swee Seng JC:**

[1] This originating summons was heard together with two other related originating summons in 24NCVC-1757-12/2011 and 24NCVC-1758-12/2011. It was an originating summons ('OS') for
E a variation of the order of the court dated 28 November 2012. The order made was that the private caveats lodged against the various titles of the plaintiff by the first defendant (D1) be removed. The other two related OS are similar applications by different plaintiffs against the same defendants and the difference
F being in the titles and the different private caveats presentation numbers. All parties appearing before the court had agreed that the decision in this application for this OS shall bind the other two similar applications filed in the other two OS.

G **Problem**

[2] The variation was applied for by the plaintiff because it was discovered in December 2012 that there had been new caveats lodged on its lands by one Alexander Li Siu Leong ("Alexander"), a director of Jerard Co Ltd. Alexander's caveats were lodged on
H 22 November 2012. The application was heard before the learned Judicial Commissioner then on 22 November 2011 and adjourned to 28 November for decision which was duly delivered in the plaintiff's favour. As can be clearly seen Alexander's caveats were
I lodged six days before the order of court to remove D1's caveats on the plaintiff's titles. For completeness the order of the court dated 28 December 2012 had ordered *inter alia* that:

(i) The private caveats lodged on the plaintiff's lands by D1 be cancelled; A

(ii) D1 or whoever for D1, by himself or through his agents, servants, representatives and/or nominees or through his companies be restrained from filing for lodgment of any private caveats and/or cause any private caveats to be filed and entered on the lands; and B

(iii) D2 do cancel the caveats immediately.

D2 is the Pendaftar Hakmilik Negeri Perak. C

Prayer

[3] The plaintiff's application is in encl. 25 for *inter alia* a variation of the order of court dated 28 November 2012 to include the removal forthwith of Alexander's caveats. A similar application was also filed in 24NCVC-1757-12/2011 in encl. 12 and in 24NCVC-1758-12/2011 in encl. 11. D

[4] On 10 April 2013, learned counsel Encik Abd Rahim Mohamed appeared for the proposed intervener Alexander. He also mentioned on behalf of Mr Anoop who could not attend court as he had been admitted to hospital. Encik Abd Rahim had filed the application to intervene a day before and had served the application on counsel for the plaintiff, Mr CK Yeoh a moment before the case was called up. Mr CK Yeoh could not contain his disappointment as on the last occasion when the case was called up on 8 March 2013, Encik Abd Rahim had mentioned the new solicitors for D1, Messrs Anoop & See. I quite agree with Mr CK Yeoh that Alexander would probably have known earlier about the said application to vary the order of court. E F G

[5] Though it was late in the day, Mr CK Yeoh indicated that he was prepared to consent to Alexander's application to intervene but that the plaintiff made no admissions as to the averments and allegations in Alexander's affidavit to intervene. The court thus made an order in terms of Alexander's application to intervene and added him as the third defendant and directed the plaintiff's application to vary the order of court and the supporting affidavit to be served on D3's solicitors. Various timelines were given for affidavits to be exhausted. The application was then fixed for hearing on 26 April 2013. H I

[6] On that day Mr SP Raman appeared and informed the court that he acts for the proposed interveners Jerard Co Ltd and Jerard Glamour Ltd and also in OS 24NCVC-1757-12/2011, for Red and Blue Investment Co Ltd. The companies were all incorporated in Hong Kong. Again it was filed a day before and served a while ago on the plaintiff's counsel just before the case was called.

[7] Learned counsel Mr CK Yeoh perceived this sudden flurry of activity as a further attempt to hinder the plaintiff from executing the order earlier obtained to have the caveats removed. He consented to the application without making admission on the affidavits filed by the new proposed interveners so that the hearing of the plaintiff's application in encl. 24 could proceed.

Principles

[8] The plaintiff argued that Jerard Co Ltd is the representative and/or nominee of D1 and that D1 is the *alter ego* of Jerard Co Ltd. The court agrees that there is a clear admission on the part of D1 in para. 12 of D1's submission (encl. 16) in respect of the hearing of this OS earlier. It was also pointed out for the court's attention that there was an admission from D1 during the trial in Kuala Lumpur High Court Civil Suit: 22 NCvC-922-09/2012 and the Kuala Lumpur High Court Civil Suit: 22 NCvC-923-09/2012 ("the KL Civil Suits"). Reference is made to para. 13.6 and exh. P3 of the plaintiff's first affidavit.

Whether The Court Has Power To Vary The Order Earlier Given

[9] Learned counsel Mr CK Yeoh submitted by referring to the fact that as the order of court of 28 November 2011 had not been sealed, the court is not *functus officio* and so could amend or vary the order given. He referred to a few authorities. In *Chee Kuan Cheng v. Chuo Kong Kah* [1967] 1 LNS 21; [1967] 2 MLJ 74, the former Federal Court observed at p. 75 (MLJ) that:

> ... the order had not been drawn up and entered. Until an order is perfected the court's jurisdiction to review the subject matter and to recall an order pronounced is undoubtedly a matter of wide discretion: see *In re Harrison's Settlement* [1955]1 All ER 185. [1955] 3 W.L.R. 156.

[10] In *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553 at pp. 557-558, the Court of Appeal speaking through His Lordship Gopal Sri Ram JCA (later FCJ) set out the proposition as follows and went on to quote the above *dictum*:

> We pause to observe that counsel and the learned judge were quite wrong in assuming that the court was *functus officio* merely because judgment had been entered against the appellant. The default orders made by the learned judge had not been extracted. The court, at that point in time when counsel for the appellant made his oral application, therefore, continued to have full control over the judgment it had entered. That proposition finds support from the decision of the former Federal Court in *Chee Kuan Cheng v. Chuo Kong Kah* [1967] 2 MLJ 74, ...

[11] Further in the Federal Court case of *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd* [1984] 1 LNS 6; [1984] 1 MLJ 286 at pp. 292-293 it was observed as follows:

> ... We are firmly of the view that where it is necessary and the justice of the case requires it, the court should be at liberty to re-open the case. It is particularly so where there has only been a provisional order and this is done to perfect the order. In the present case we think that the learned Judge had acted correctly when he re-opened the case with a view to perfecting the order.

[12] If further authorities are needed, one can refer to *Chua Wah Keow v. Ng Ho Huat & Anor* [1961] 1 LNS 20; [1961] MLJ 321 at p. 323 (MLJ) where Tan Ah Tah J referred to the case of *Re Roberts* [1887] WN 231 where it was observed as follows:

> ... where an order had not been drawn up, whether it were made in chambers or in Court, the Judge had a right, if something was brought to his attention which he had not sufficiently considered, to stay the drawing up of the order and rehear the matter before making a final order.

[13] By way of analogy and extension, if a matter could not have been brought up because it was unbeknown to the plaintiff's counsel at that time when the order was made and which matter would have an effect on the order given, then surely it could be brought up before the order is perfected.

[14] It has also been said that this power of the court to amend or vary an order before it is perfected is part and parcel of the inherent jurisdiction of the court. The court in *Credit Corporation (M) Bhd v. National Insurance Co Ltd* [1975] 1 LNS 21; [1975] 2 MLJ 104 was asked to amend a court order before it was perfected as the solicitors had omitted to ask for costs. His Lordship Chang Min Tat J (later FCJ) held at p. 106 (MLJ) as follows:

> In the circumstances of this case and on the authorities, I conceive that I have the power either under the inherent jurisdiction of the court where the order had not been drawn up and entered, or under the liberty to apply implied in the order or by virtue of O. 28 r. 11 of the R.S.C. to grant the order sought for in the Summons-in-Chambers together with costs of the application to be taxed by the proper officer of this court and when taxed to be paid by the respondent to the applicant.

[15] Bringing the authorities more up to-date, one may refer to the case of *Commercial Plastic Industries Sdn Bhd v. Lim Chin Cheap & Ors* [2002] 4 CLJ 694; [2002] 6 MLJ 629 where Ramly Ali J (now JCA) pointed out as follows:

> In exercising the power to amend or vary an order, the court must look at the intention of the court in pronouncing the order. The court may exercise the power in order to bring it into harmony with the order which the court obviously intended or meant to pronounce ...
>
> In this respect, I am in full agreement with Kamalanathan Ratnam J in 'Gang Cheng', where his Lordship said (at p. 496):
>
> > Surely, the court has an inherent power to vary its own order so as to carry out its own meaning and to express its meaning as plainly as possible. To do justice, it is necessary that the court be given a discretion to recall and correct any misgivings in its judgment before it is perfected, to bring it into harmony with the order which the court obviously meant to pronounce.

[16] Having held that this court was not *functus officio* and that it has the power to amend or vary the order given, I shall now consider whether that power should be so exercised to include in the order the removal of Alexander's caveats lodged before the order was made but unbeknown to the plaintiff.

Whether The Order Of The Court Ought To Be Varied To Prevent An Abuse Of Process By The D1 And His Nominees Or Agents

[17] Mr CK Yeoh had perceptively pointed to the court the striking similarity between the statutory declaration (SD) of D1 and that of Alexander in support of their respective application in Form 19B for their respective caveats to be lodged. In the SD of D1 (paras. 1-6) where D1 gave a brief account as to how the plaintiff had acquired the lands, D1 had referred to Jerard Co Ltd

as his nominee. The fact that Jerard Co Ltd is his nominee is further confirmed during the trial in the KL Civil Suits. See para. 13.6 and exh. P3 of the plaintiff's first affidavit in encl. 25. D1 then stated in his SD that he is beneficially entitled to the lands.

[18] The SD of Alexander signed in support of the caveats lodged by him appears to have emanated from the same mould. It states that Alexander is a director of Jerard Co Ltd. Paragraphs 2-6 of his SD is the same storyline with the SD of D1 with respect to how the lands were acquired. It would not be incorrect to say that paras. 2-6 of Alexander's SD (exh. P2 of encl. 25) are identical or almost identical to D1's averments in para. 1-5 of D1's SD. It bears the *imprimatur* of the originator of D1's SD. It is not a strange coincidence but a strong suggestion of an acting in concert where the lodging of the caveats are concerned. Alexander's caveats were lodged to protect the interest of Jerard Co Ltd (paras. 10 and 12 of Alexander's SD). Alexander's caveats were lodged on 26 November 2012, some six days before the court's decision such that the order of the court if granted for the removal of the caveats would be frustrated by the Alexander's caveats. It smacks of a strategy to render superfluous and sterile the order of the court. Alexander's caveats were lodged by Messrs Tung Chan & Partners, the current solicitors for D1 in the KL Civil Suits. To distance itself from D1 in the current OS, Messrs Tung Chan & Partners had acted for Alexander whilst D1 is now being represented by Messrs Anoop & See. It is just too close for comfort and too difficult to be convinced that there is a China Wall between the solicitors for D1 and the same solicitors for Alexander where knowledge of the caveats are concerned.

[19] I agree with Mr CK Yeoh that although Alexander may be the caveator, for all intents and purposes, Alexander's caveats were lodged for and on behalf of Jerard Co. Both Alexander and D1 are directors of Jerard Co Ltd. D1's assertion that Alexander is not his nominee or that he is not aware of the filing of Alexander's caveats appears hollow indeed.

[20] It can be safely concluded that narration of the facts to justify a caveatable interest reflects a collaborative concerted effort to ensure that the order of the court for the removal of the caveats is rendered sterile. Indeed the documents appear to

emanate from the same source as even the *jurat* clause is identical to each other down to its format, spacing and positioning on the relevant page. That is an abuse of the court's process.

[21] More so when the order of the court has a prohibition against the lodging of further caveats by D1's agents or servants or nominees. By admission of D1, Jerard Co Ltd is his nominee company. It would be fair to say that Alexander's caveats were lodged for a collateral purpose calculated to contain, if not, to cancel the effect of the order of 28 November 2012. It was, to use the language of the plaintiff, an "insurance" in that even if the order for the removal of the caveats was granted, the plaintiff's lands will remain caveated. Such a collateral action calculated to conceal and obscure the obvious is an obstruction of justice. It is inimically an interference with the administration of justice and abhorrently an abuse of process.

[22] In *HSBC Bank Malaysia Bhd v. Tirathrai Sdn Bhd* [2009] 1 CLJ 286; [2009] 7 MLJ 168, various caveats were entered, injunctive and restraining orders applied for, all to abort if possible the auction of the first respondent's land following an order for sale that had been granted. His Lordship Mohd Hishamudin J (now JCA) at p. 291 (CLJ); p. 174 (MLJ) held that:

> [10] In my judgment, based on the facts, and also on the inferences of facts that could reasonably be drawn from the basic facts, this case has much more to do with subtle illegal actions rather than just merely about auctions being adjourned. It is my finding that the conduct of the second to the fifth respondents as a whole amount to an open defiance and a *frontal attack on the authority of the court and the administration of justice. Their actions are deliberate and intentionally designed to frustrate the order for sale that the court had made.* (emphasis added)

[23] Further at p. 309 (CLJ); p. 191 (MLJ), His Lordship castigated the actions of the second to the fifth respondents as follows:

> [84] Interference with the administration of justice covers any act that impedes the ability of our courts to do and deliver justice. Likewise, obstructing the course of justice covers any act that is obstructive to the course of justice. As at 26 January 2005, the order for sale issued on 20 March 2003 has yet to be given effect to. As at that date three scheduled public auctions have not been able to be carried out, and there is a caveat in the way of the

scheduled fourth auction. The respondents have stultified the foreclosure proceeding without the first respondent having to repay its indebtedness. Abuse of process is punishable with contempt of court (see *Affin Bank Bhd v. Tan Sri Kishu Tirathrai* [2004] MLJU 246; [2004] 7 CLJ 145).

[85] With respect, I accept without any reservation whatsoever Mr Benjamin Dawson's submission that the machinations of the respondents in the resent case are so serious, so gross and too flagrant to be ignored. The temerity of the respondents to do what they did demonstrates not only their utter disregard and lack of respect for the authority, dignity and integrity of the court and the administration of justice, but an overt manipulation and undermining of the legal process without any compunction whatsoever resulting in the court process being used as a tool of oppression and injustice.

[24] Though the admonishment was in the context of a contempt proceeding, this court in preventing any abuse of process, can surely intervene by amending or varying the order that had been given to cover the removal of the new caveats lodged by Alexander, as the matter has been disclosed to the court, the court would doubtless, have granted the order to remove D1's caveats to include Alexander's caveats.

[25] In another context where various attempts were made by a judgment debtor to stay an execution of a summary judgment obtained against him, His Lordship Abdul Malik Ishak J (now JCA) in *Affin Bank Bhd v. Tan Sri Kishu Tirathrai (No. 2)* [2004] 7 CLJ 145 observed as follows at p. 157:

From the chronology of events, it is apparent that encl. 32 represents the defendant's fifth attempt to prevent the plaintiff from executing the summary judgment. The writ of seizure and sale is all encompassing. It allows execution to be levied against either the movable or immovable property of the judgment debtor - referring, of course to the defendant. *The repeated attempts by the defendant to prevent execution of the summary judgment represent a clear abuse of the process of the court and this court is entitled to exercise its inherent powers under O. 92 r. 4 of the RHC to disregard and strike out encl. 32 forthwith*. I would agree with the plaintiff that encl. 32 constitutes an abuse of the process of the court. (emphasis added)

[26] Learned counsel for D1 and the interveners submitted that the proper procedure would be for the plaintiff to file a fresh action to remove Alexander's caveats and that the court cannot

make such a substantial change to the order earlier granted by adding the removal of the fresh caveats lodged by Alexander. As the court was not *functus officio* and as all the parties having interests in the outcome of the case are before the courts having intervened in this OS, I see no good reason not to hear the parties duly represented by their solicitors. To accede to the suggestion of D1 and the interveners to have the matter heard only if a fresh OS is filed for the removal of the caveats would be retrogressive when there is a clear abuse of the process.

Whether Alexander Has A Caveatable Interests On The Plaintiff's Lands

[27] At any rate, taking D1's case at its highest, it is that of either a director or shareholder with Jerard Co Ltd, which in turn, has a substantial interest of 28% in the plaintiff. Taking D3's case at its highest, it is only that of being a director of the Jerard Co Ltd together with D1. His position cannot be better than D1, a director Jerard Co Ltd which has a substantial interest in the plaintiff company that owns the lands.

[28] Putting D1's case and that of the other interveners at their highest, for whatever sums of monies they had advanced to Jerard Co Ltd and which Jerard Co Ltd further injected into the Special Purpose Vehicle (SPV) in the plaintiff, that cannot transform the interest of Alexander or that of Jerard Co Ltd into a caveatable interest. The proposition of law had been laid down in the case of *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor & Another Appeal* [2003] 3 CLJ 339 at p. 343; [2003] 4 AMR 550 at p. 554, where His Lordship Gopal Sri Ram JCA (later FCJ) said:

> It is established by authority that a joint venture agreement to develop land and to share proceeds of the development does not confer a caveatable interest even if the agreement itself expressly provides for entry of a caveat (see *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 MLJ 113 per Hashim Yeop A Sani SCJ).

[29] The Federal Court in *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802; [2012] 5 AMR 485, through His Lordship Arifin Zakaria CJ clarified the meaning of caveatable interest in the context of joint venture agreements or in that case a joint venture cum project management (JVPM) with respect to developing lands for sale to purchaser:

[35] It is our considered view, therefore, that based on the provisions of the NLC and the authorities cited above, the only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest.

[36] Emphasis should be given to the words "registrable interest" in s. 323(1)(a) of the NLC. To be caveatable, the interest must be an interest in the land and that interest must be capable of registration. In short, it must represent a transaction that can ultimately lead to its registration on the register.

[37] *Reverting to this appeal before us, although the appellant has conferred numerous rights on the respondent under the JVPM agreement and the powers of attorney, all these rights are merely rights to develop the land that would give rise only to a monetary interest, ie, a right in personam against the appellant and does not create any interest in the land.*

[38] Under the NLC, these rights are not capable of registration. They do not fall under any scheme of dealings in alienated lands as provided under Division IV of the NLC.

Present interest as opposed to potential interest

[39] It is also our considered view that the caveator under s. 323(1)(a) of the NLC must have a present interest as opposed to a potential interest in the land. The registrable interest that the caveator is claiming for, must be an existing interest. The caveator under s. 323(1)(a) of the NLC must be limited to those who are claiming to an existing interest in the land or right to such existing interest and cannot include potential interest or interest in future. (emphasis added).

[30] Thus shareholders and directors who have disputes with one another in a company have no right to caveat the company's landed assets. They may well proceed to an injunction to restrain the company from disposing of the landed assets of the company especially if fraud or unconscionable conduct is involved if they can satisfy the tests laid down for interlocutory injunction.

[31] Learned counsel for Alexander, Encik Abd Rahim referred to the Court of Appeal case of *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639; [1995] 3 AMR 2375 where His Lordship Gopal Sri Ram JCA (later FCJ) commented as follows:

> Having consulted the relevant authorities, in particular the judgment of Suffian LP in *Mahadevan v. Patel* [1975] 2 MLJ 207, I am not at all sure that the order directing the removal of the second caveat was correct. I say nothing about the correctness of so much of the order that directed the removal of the first caveat. But my silence upon it must not be taken either as a disapproval or an affirmation of the decision removing it. I merely elect to say nothing about it.

[32] Mr Das for the intervener drew our attention to the decision of the Supreme Court in *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120; [1992] 2 MLJ 189 which he said was authority for the proposition that a director cum shareholder has no caveatable interest in the immoveable property of his company. In fairness to counsel, that case may well be read as supporting the proposition advanced by counsel. *Mahadevan* (*supra*) does not appear to have been cited to the Supreme Court in *Hew Sook Ying*. I am unable to say what the decision might have been if this had been done.

[33] Although the point does not fall for decision in the present appeal, it may become necessary for this court at some future time to determine the circumstances, if any, in which a director or even a shareholder may be recognised as having a caveatable interest in immoveable property belonging to the company. There are certainly strong reasons of policy warranting the conferment upon the director of a limited company of a caveatable interest in his company's immoveable property for the limited purpose of protecting that property from being dealt with contrary to law. To state the contrary in absolute terms is to issue a licence to directors who command a majority on the board of a company to strip that company of all its landed assets in breach of their fiduciary duties. In these circumstances, a director who is in the minority on the board will not be able to prevent the defalcating directors from disposing of the company's lands save by the entry of a caveat. An injunction may not always be as effective in such cases. Similarly, the interests of the company in land belonging to a third party may be protected on the company's behalf by the entry of a caveat by a director on behalf of his company as was done in *Mahadevan* (*supra*).

[34] Recognising that a company director has a caveatable interest in the immovable property of his company will enable him to get across the first of the three steps enumerated in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520; [1995] 2 AMR 969. But that does not mean that a company director's caveat ought, in all cases, to survive. If such a caveat is unable to surmount the other two steps referred to by this court in *Luggage Distributors*, then, of course, it will no doubt be removed. Viewed from this perspective, the decision in *Hew Sook Ying* is entirely justifiable on its own peculiar facts. If I am driven to resolve the apparent conflict, which Mr Das says, exists between the Federal Court in *Mahadevan* and the Supreme Court in *Hew Sook Ying*, then I must, with all the humility at my command, express my preference for the former.

[35] However, until Parliament changes the law on caveats under the National Land Code, the above comments remain mere *obiter*. See also the case of *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 AMR 169.

[36] In the meanwhile I find the approach taken by the Court of Appeal in *North Plaza Sdn Bhd v. United Securities Sdn Bhd* [2010] 1 CLJ 470; [2010] 1 MLJ 631 consistent with the concept of separate legal entity between a company and its shareholders and directors and the scheme of caveatable interests under the National Land Code 1965. His Lordship Hishamudin Yunus JCA observed as follows at p. 480 (CLJ); p. 640 (MLJ):

> [22] But the fact remains that the respondent is not the registered owner of the parcels of land in respect of which caveats are lodged. The registered owner, as has been pointed out earlier, is CCSB. It is an elementary principle of company law that a company (and in the context of the present case, it is CCSB) is a legal entity which is independent and separate from its shareholders. It therefore follows that *the respondent, having merely a beneficial interest in the shares of CCSB, does not have any proprietary rights (either legal or equitable) over the parcels of land* (*Macaura v. Northern Assurance Co Ltd* [1925] AC 619; *Abdul Aziz bin Atan & 87 Ors v. Ladang Rengo Malay Estate Sdn Bhd* [1985] 2 MLJ 165). Hence, the respondent is not an aggrieved person (or body) in relation to the parcels of land and the caveats for the purpose of s. 327(1) of the NLC; and the legal position would still be the same even if the respondent were to be registered shareholders of those shares. In our view, if at all any

party is aggrieved by the existence of the caveats, it would be CCSB and not the respondent. Since the respondent is not a aggrieved person, they have no *locus standi* to make the application under s. 327(1) of the NLC. (emphasis added)

[37] As mentioned before, if there are valid grounds for an injunction to be granted, then it can always be applied for and in urgent cases, even *ex-parte* on a Certificate of Urgency. The aggrieved registered owner can then have an opportunity to apply to set it aside. To allow a shareholder or director of a company to lodge a caveat on the land owned by the company just because there are disputes between the shareholders and/or between the directors would not only offend the principle of separate legal entity but also put a tremendous strain on the system and scheme of a caveatable interest under the National Land Code 1965 bearing in mind that the duty of the Registrar of Land Titles upon presentation of a caveat for registration is purely administrative.

[38] The reasons for removing the caveats are set out by the learned Judicial Commissioner Choong Siew Khim JC in the order of the court of 28 November 2012 in her judgment reproduced below:

9. I am further inclined to agree with the plaintiff's submission that whatever relationship between the first defendant, Chin Peng Sin and his family and the plaintiff is essentially a business joint-venture from which the first defendant's interest in the plaintiff through his nominee is to obtain profits from the dividends that would be declared by the plaintiff. In this event, the first defendant having a beneficial interest in the shares of the plaintiff through his nominees does not have any proprietary rights at all, whether legal or equitable over the caveated lands (see *North Plaza Sdn Bhd v. United Securities Sdn Bhd* [2010] 1 MLJ 631). In the like manner, profits and monetary interest from the shareholders' agreement does not confer any caveatable interest (see *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor* [2003] 3 MLJ 522 and *Trans-Summit Sdn Bhd v. Chun Nyook Lin* [1995] 2 MLJ 247).

[39] That being the case, the position of Alexander's caveats on the plaintiff's lands is no different from D1's caveats that had been removed. I had no doubt that had Alexander's caveats been brought to the attention of the court then, the court would have dealt with it similarly with identical result in that Alexander's caveats would have been removed as well.

Pronouncement

[40] I had thus made an order in terms of encl. 24 and had allowed the order of 28 November 2012 to be varied accordingly to include the removal of Alexander's caveats. As agreed this decision would bind similar applications in the other two OS.

[41] After hearing submissions on costs, I ordered D3 to pay the plaintiff costs of RM15,000 and D4 and D5 together to pay costs of RM5,000 to the plaintiff.